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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Jack Nevins,

10 Plaintiff,

11 vs.

12 Upward Foundation, an Arizona non-profit
13 corporation,

14 Defendant.

No. CV-11-00563-PHX-NVW

ORDER

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16 Before the Court is Defendant's Motion to Dismiss Complaint (Doc. 6) and
17 Plaintiff's Motion for Leave to Amend Complaint (Doc. 8). The Court will grant
18 Defendant's motion and deny Plaintiff's motion as moot in light of the pending motion
19 for leave to file a second amended complaint.

20 **I. MOTION TO DISMISS LEGAL STANDARD**

21 To state a claim for relief under Fed. R. Civ. P. 8(a), a plaintiff must make "'a
22 short and plain statement of the claim showing that the pleader is entitled to relief,' in
23 order to 'give the defendant fair notice of what the . . . claim is and the grounds upon
24 which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
25 omitted). This "short and plain statement" must also be "plausible on its face." *Ashcroft*
26 *v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A claim is plausible if it contains sufficient
27 factual matter to permit a reasonable inference that the defendant is liable for the conduct
28 alleged. *Id.* "Determining whether a complaint states a plausible claim for relief . . . [is]

1 a context-specific task that requires the reviewing court to draw on its judicial experience
2 and common sense.” *Id.* at 1950.

3 A proper complaint needs no “formulaic recitation of the elements of a cause of
4 action,” *see Twombly*, 550 U.S. at 555, but the plaintiff must at least “allege sufficient
5 facts to state the elements of [the relevant] claim,” *Johnson v. Riverside Healthcare Sys.,*
6 *LP*, 534 F.3d 1116, 1122 (9th Cir. 2008). All of the plaintiff’s plausible factual
7 allegations are accepted as true and the pleadings are construed in a light most favorable
8 to the plaintiff. *Kniesel*, 393 F.3d at 1072.

9 **II. BACKGROUND**

10 The following facts are accepted as true for purposes of Upward Foundation’s
11 motion to dismiss.

12 Defendant Upward Foundation is an Arizona nonprofit corporation that receives
13 federal financial assistance. On August 14, 2001, Defendant Upward Foundation hired
14 Plaintiff Jack Nevins to be Upward Foundation’s executive director. At that time,
15 someone at Upward Foundation told Nevins that he would receive deferred
16 compensation, just as previous executive directors had received deferred compensation.
17 Upward Foundation’s Board of Directors approved such deferred compensation for
18 Nevins before hiring him, amounting to \$225,000 after five years of employment, and
19 \$337,500 after 10 years of employment. Nevins, however, never received a copy of that
20 Board resolution, nor did he receive any other document memorializing the terms of
21 deferred compensation, but he knew that such deferred compensation would be funded
22 through a life insurance policy on his own life. Such a policy was indeed issued on
23 December 13, 2002.

24 In 2009, Nevins began discussing the deferred compensation plan with Upward
25 Foundation representatives. The plan had not been fully funded, and Nevins wanted to
26 reduce the deferred compensation arrangement to writing. Upward Foundation agreed to
27 negotiate with Nevins on this issue.
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1 Around the same time, Nevins began to experience problems with one of his eyes,
2 requiring multiple surgeries and eventually resulting in legal blindness. These medical
3 issues lasted through February 2010, during which time very little progress was made on
4 Nevins's deferred compensation agreement.

5 Despite these medical challenges, Nevins missed little time at work. In fact,
6 throughout Nevins's time at Upward Foundation, he had never received a negative
7 performance review, written warning, or disciplinary action of any type. However,
8 according to minutes from Upward Foundation's board meeting on January 18, 2010, the
9 president of Upward Foundation's board of directors, Alan Havir, moved to terminate
10 Nevins as soon as possible. The board approved the motion and directed Havir to inform
11 Nevins of the termination as soon as possible.

12 Nevins was not aware of the board's resolution at the time the board made it, and
13 Havir did immediately say anything to Nevins. In mid-February 2010, Havir visited
14 Nevins at the office and asked about Nevins's health but did not mention the board
15 resolution. About a week later, Havir terminated Nevins without explanation. Nevins
16 was offered a severance package, but that package was withdrawn when Nevins
17 informally asserted legal claims against Upward Foundation. To this date, Nevins has
18 not received any severance or deferred compensation, although the life insurance policy
19 that was supposed to fund his deferred compensation is currently worth about \$200,000.

20 **III. PROCEDURAL HISTORY**

21 Nevins believes that Upward Foundation fired him either because of his medical
22 conditions, his insistence on reducing the deferred compensation agreement to writing
23 and making sure it was funded, or both. To that end, he alludes to a discrimination
24 charge filed with the EEOC (Doc. 1-1 ¶ 49), and he eventually filed suit in Maricopa
25 County Superior Court, alleging three causes of action: (1) violation of the Rehabilitation
26 Act, 29 U.S.C. § 794; (2) violation of the Arizona Wage Act, A.R.S. § 23-350 to -362;
27 and violation of the Arizona Employment Protection Act, A.R.S. § 23-1501. Upward
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1 Foundation removed to this Court based on federal question jurisdiction and has now
 2 moved to dismiss.

3 **IV. ANALYSIS**

4 **A. Rehabilitation Act Claim**

5 The Rehabilitation Act provides: “No otherwise qualified individual with a
 6 disability in the United States . . . shall, solely by reason of her or his disability, be
 7 excluded from the participation in, be denied the benefits of, or be subjected to
 8 discrimination under any program or activity receiving Federal financial assistance”
 9 29 U.S.C. § 794(a). Nevins claims that his blindness makes him an “individual with a
 10 disability,” and that Upward Foundation terminated him “[m]otivated in part by
 11 Plaintiff’s disability, and Defendant’s perception of Plaintiff being disabled.” (Doc. 1-1
 12 ¶ 37.)

13 As alleged, Nevins cannot sustain a Rehabilitation Act claim because he claims
 14 that Upward Foundation was “[m]otivated in part by [his] disability,” rather than
 15 motivated “solely” by his disability, as the Rehabilitation Act requires. As pleaded, then,
 16 the claim must be dismissed.

17 **B. Wage Act Claim**

18 **1. Deferred Compensation as “Wages”**

19 Under the Wage Act, “if an employer . . . fails to pay wages due any employee, the
 20 employee may recover in a civil action against an employer or former employer an
 21 amount that is treble the amount of the unpaid wages.” A.R.S. § 23-355(A). The Wage
 22 Act defines “wages” as

23 nondiscretionary compensation due an employee in return for
 24 labor or services rendered by an employee for which the
 25 employee has a reasonable expectation to be paid whether
 26 determined by a time, task, piece, commission or other
 method of calculation. Wages include sick pay, vacation pay,
 severance pay, commissions, bonuses and other amounts
 promised when the employer has a policy or a practice of
 making such payments.

27 A.R.S. § 23-350(5).
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1 Upward Foundation argues that deferred compensation is not “wages” for
2 purposes of the Wage Act. No located authority answers the question of whether
3 deferred compensation qualifies as “wages,” but the Wage Act as a whole demonstrates
4 that “wages” refers primarily to regularly received compensation. *See* A.R.S. § 23-
5 351(C). Nevins’s alleged deferred compensation does not fall under this definition.
6 Accordingly, the Wage Act claim will be dismissed for failure to state a claim.

7 **2. ERISA Preemption**

8 Upward Foundation also argues that the Employment Retirement Income Security
9 Act (ERISA) preempts Nevins’s Wage Act claim. Specifically, Upward Foundation
10 claims that the deferred compensation arrangement Nevins described in his complaint
11 qualifies as a “plan . . . established or maintained by an employer . . . [that] results in a
12 deferral of income by employees for periods extending to the termination of covered
13 employment or beyond.” 29 U.S.C. § 1002(2)(A)(ii). Nevins’s alleged deferred
14 compensation arrangement falls within this definition. Accordingly, Nevins’s Wage Act
15 claim fails both because his deferred compensation is not “wages” under the Wage Act,
16 and because ERISA preempts the claim.

17 **C. Employment Protection Act Claim**

18 **1. The Employment Protection Act’s Applicability**

19 The Arizona Employment Protection Act allows employees to bring wrongful
20 termination claims against employers under various circumstances, but none of those
21 circumstances apply to Nevins’s allegation that Upward Foundation terminated him
22 because he had complained about the absence of a written deferred compensation
23 agreement. Nevins’s claim that he was fired because of his legal blindness does fit within
24 the Employment Protection Act’s deference to bringing wrongful termination claims
25 when “[t]he employer has terminated the employment relationship of an employee in
26 violation of a statute of this state . . . including . . . the civil rights act prescribed in title
27 41, chapter 9.” A.R.S. § 23-1501(3)(b)(i). However, because the Civil Rights Act
28 “provides a remedy to an employee,” that Act’s statutory remedies “are the exclusive

1 remedies” available to Nevins. A.R.S. § 23-1501(3)(b). He cannot sure under the
2 Employment Protection Act. Hence, Nevins’s third cause of action does not state a claim
3 for relief.

4 **2. ERISA Preemption**

5 Upward Foundation claims that, like Nevins’s Wage Act claim, ERISA preempts
6 Nevins’s Employment Protection Act claim. Upward Foundation is correct, and
7 therefore Nevins’s Employment Protection Act claim also founders on ERISA.


8 **D. Leave to Amend**

9 At the same time Nevins filed his response to Upward Foundation’s motion to
10 dismiss, he filed a motion to amend his complaint. Nevins has since filed a motion for
11 leave to file a second amended complaint. The first motion for leave is therefore moot,
12 and the Court will await full briefing on the second motion.

13 IT IS THEREFORE ORDERED that Upward Foundation’s Motion to Dismiss
14 Complaint (Doc. 6) is GRANTED.

15 IT IS FURTHER ORDERED that Nevins’s Motion for Leave to Amend
16 Complaint (Doc. 8) is DENIED as moot.

17 Dated this 30th day of June, 2011.

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20 Neil V. Wake
21 United States District Judge
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